NO. 92-1371

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF ARIZONA,

Petitioner,

v.

RONALD SWANSON,

Respondent.

Petition for Writ of Certiorari
to the Arizona Court of Appeals

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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STATEMENT OF THE CASE

As his Statement of the Case, Respondent adopts the "FACTS AND PROCEDURAL HISTORY" section of the opinion of the Arizona Court of Appeals, Petition Appendix at A-2 through A-6. Petitioner's Statement of the Case, Petition at 4 through 10, adds details to the appellate court's statement of facts, which were not relied upon by that Court in forming its opinion.

To summarize, the Court of Appeals held that:

a. The officers had lawful reason to stop Respondent's car, Petition Appendix at A-8 through A-10.

b. The trial court's finding that Respondent voluntarily consented to the search was not clearly erroneous,

Petition Appendix at A-10 and A-11.

c. The trial court's finding that the search exceeded the scope of that consent when the officers invaded the internal structure of the car was factually supported, Petition Appendix at A-11 through A-16.

d. The State conceded that when they commenced the search, the officers had no probable cause to believe the car contained evidence of criminal activity, Petition Appendix at A-16.

e. The trial court's finding that the officers had a "reasonable basis" to extend the search beyond the scope of consent applied the wrong standard for such questions, for a warrantless search must be supported by probable cause in order to be lawful, Petition Appendix at A-16 through A-18.

f. It was necessary then that the Court of Appeals examine the record to determine whether the extension of the search could be factually supported by a finding of probable cause, Petition Appendix at A-18 and A-19.

SUMMARY OF THE ARGUMENTS PRESENTED

Upon its review of the evidence and the law applicable to the question, the Arizona Court of Appeals held that application of the correct, "probable cause" standard required a finding that the officers lacked the requisite probable cause needed to justify their extension of the search beyond the scope of the consent given, Petition Appendix at A-19 through A-29. Its opinion is entirely consistent with Florida v.

Jimeno, ___ U.S. ___, 111 S.Ct. 1801, ___ L.Ed.2d ___ (1991), United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990), and the Arizona and other federal cases it cites. The exigencies which create the automobile and consent exceptions to the warrant requirement of U.S. Const. Amends. IV and XIV are carefully and narrowly tailored to the modifier therein that protects the "right of the people to be secure . . . against unreasonable searches and seizures . . . ." Here, the Arizona Court of Appeals has applied the correct rule of law to the facts before it. Petitioner seeks by its Petition that this Court overthrow the rule of probable cause and create a bright-line rule that it is always reasonable for police in a consent search to invade the structural integrity of the vehicle.

This Court has avoided bright-line rules in Fourth Amendment cases in the past and, in keeping with Jimeno, should continue to uphold the rule of fact-based "reasonableness."

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE ARIZONA COURT OF APPEALS HAS CORRECTLY APPLIED THE REASONABLENESS STANDARD OF Florida v. Jimeno TO THE FACTS OF THIS CASE.

The Arizona Court of Appeals stated that it had reviewed the evidence of the case, Petition Appendix at A-10. Its opinion discusses the relevant facts at length. It had before it the suppression hearing and jury trial transcripts; it weighed all carefully in exercising its authority as a reviewing court; and it

correctly concluded that the trial court had applied the wrong standard to the extension of the search beyond the consent given.

The issue in Florida v. Jimeno was whether the consent to search the interior of an automobile included opening a closed paper bag located within the car. The Court applied a standard of "objective reasonableness" as to whether the consent included the paper bag, and described its question as "what would the typical reasonable person have understood by the exchange between the officer and the suspect? . . . whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car." Jimeno, 111 S.Ct. at 1803 - 1804. The

paper bag in Jimeno was in plain view and well within the area reasonably expected to be searched. The structural integrity of the vehicle was not breached.

Both the trial court and the Court of Appeals in our case concluded that it was unreasonable for the officers to believe the consent they had received included searching behind the door panels and thus invading the car's structural integrity. As Petitioner has said, Petition at 16: "Consent to search one's vehicle would not ordinarily include consent to the removal of the door panels." The trial court however found that the officers had a "reasonable basis" to remove the door panels that arose from their observations during the search, based upon their experience and training, Petition Appendix at A-17

through A-18. This finding was not based upon any claim by the officers as to their understanding of the exchange between Respondent and them at the time of consent.

On review, the Court of Appeals held that the trial court had used the wrong standard; it then applied the correct "probable cause" standard to the same facts which the trial court had found to provide a "reasonable basis" for extending the search, and concluded that these facts did not rise to the level of probable cause which would permit that extension beyond the scope of the consent given. The Court of Appeals noted that the officers had not testified to any connection between their own experience and their assertion of the "common knowledge" that led them to remove the

panel, Petition Appendix at A-17 n.6.

In describing its understanding of the applicability of Jimeno to our facts, the Court of Appeals said, Petition Appendix at A-15 n.5: "In Jimeno, the Supreme Court held that a general consent to search the car for narcotics included consent to search a paper bag lying on its floor. We do not believe, however, that the typical reasonable person would find that consent to 'take a look in the car' for drugs, weapons, or large sums of money included consent to dismantle the car in the process." Petitioner appears to agree. Petition at 16.

II. THE CASE OF United States v. Garcia, CITED AT LENGTH BY THE COURT OF APPEALS, CORRECTLY APPLIES THE RULE IN Florida v. Jimeno.

The appellate opinion discussed the Garcia case at length, Petition Appendix at A-12 and A-13, A-26 through A-28. The Garcia court held that the officers exceeded the scope of the consent given when they went behind the door panel, a part of a car "not normally included in this set of areas to be searched" because that action is "inherently invasive", Garcia, 897 F.2d at 1419 - 1420. As to this holding Garcia presages the Jimeno "objective reasonableness" rule. The fruits of the search extension were admissible in Garcia because the officers had developed probable cause to go beyond the door panel when they had seen from above through the window hole that there were packages behind the door. In terms of Jimeno, it was reasonable in Garcia under the consent they had been given for

the officers to look down through the window hole to see if anything were inside the door, but it was unreasonable just to proceed to open the panel.

In our case, the State has conceded that at the beginning of the search, the officers lacked probable cause to believe the car contained evidence of criminal activity. Petition Appendix at A-16. The Court of Appeals' review of the evidence led it to conclude that the officers' suspicions of something behind the door never rose to the level of probable cause -- that the officers never developed any further investigation before they opened the door panel (such as first looking down through the window hole), and the reviewing court could not reasonably say that probable cause existed to permit a further search.

III. MOST OF THE CASES CITED BY PETITIONER ARE NOT APPOSITE TO THE FACTUAL SITUATION OF THIS CASE.

The cases cited by Petitioner easily separate into four categories which demonstrate their inapplicability here. Of these cases only Garcia, United States v. Espinosa, 782 F.2d 888 (10th Cir. 1986), and Ragin v. State, 192 Ga. App. 686, 385 S.E.2d 770 (1989), were cited by Petitioner to the Arizona appellate courts.

A. In the first group of cases, the defendant consented and actively participated in the search. In such situation, a defendant cannot later say that there was an "objective" failure to communicate with the officer under Jimeno about the extent of the search, since he had participated in it. This group

includes United States v. Gutierrez-Mederos, 965 F.2d 800 (9th Cir. 1992) (a post-Jimeno case; driver opened hatchback for officer, and gave him the keys); United States v. Pena, 920 F.2d 1509 (10th Cir. 1990) (driver opened trunk with his own screwdriver; he then opened his suitcase for officer to inspect); People v. Crenshaw, 9 Cal. App. 4th 1403, 12 Cal. Rptr. 2d 172 (App. 1992) (a post-Jimeno case; driver opened car doors and trunk, then delivered keys to officer; driver was then arrested on warrant; officer continued search after arrest); Ragin v. State (driver denied car was his, thus had no standing to object to search; driver unlocked trunk for officers); and State v. Valencia Olaya, 105 N.M. 690, 736 P.2d 495 (App. 1987) (driver opened trunk for officer and

specifically consented to search of luggage, glove box, and interior of car). In our case, the driver and passenger did not participate in the search, Petition Appendix at A-5.

B. In the second group, the defendant signed a form, consenting to a complete search. See United States v. Blanco, 844 F.2d 344 (6th Cir. 1988), cert. denied, 486 U.S. 1046, 108 S.Ct. 2042 (1988); United States v. Torres, 663 F.2d 1019 (10th Cir. 1981); and State v. Santana, 215 N.J. Super. 63, 521 A.2d 346 (A.D. 1987). Again, in terms of Jimeno, it is reasonable to understand that permission to conduct a complete search will result in a thorough one, and these appellate courts so construe "complete." Respondent in our case specifically declined to sign such a consent form,

Petition Appendix at A-4, and A-13 through A-15.

C. In the next group of one case, United States v. Espinosa, the defendant was subjected to the "functional equivalent of a border search," for which the protections of the Fourth Amendment are arguably lessened. See United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), cited in Espinosa. The driver in Espinosa had been stopped at a permanent Border Patrol checkpoint near Las Cruces, NM; the officer's suspicions were initially aroused by the driver's hesitant, incomplete answers to otherwise innocuous questions. The reviewing court held that the trial court finding of reasonableness in the parties' understanding of the consent given (per Jimeno) was not

clearly erroneous. There is a contrary position, however: see United States v. Reed, 882 F.2d 147 (5th Cir. 1989) (officers at border patrol checkpoint still need probable cause to search). No such border-equivalency occurred in our case. The trial court and the Court of Appeals found that the extent of the search clearly exceeded the scope of the consent given; the reviewing court held the proper standard for extension of the search (per Garcia) to be probable cause.

D. Finally, there are the two cases cited by Petitioner in which the reviewing court applied the standard of probable cause to determine whether the extension of the search beyond the consent given was permissible. See United States V. Lugo, 978 F.2d 631 (10th Cir. 1992) (a post-Jimeno case which does

not discuss that rule: an otherwise unjustifiable warrantless search would have been upheld, had the officers relied upon probable cause, but the court found that their testimony omitted the crucial facts needed to support such a finding); and United States v. Garcia (officers looked through window hole and saw packages behind door). The Arizona Court of Appeals applied this correct standard to the facts of our case and found that it had not been met.

IV. PETITIONER MISREADS THE COURT OF APPEALS OPINION.

As noted above, the Arizona Court of Appeals followed the Garcia decision because it stated the correct, "probable cause" standard that also pertains as to Arizona searches, Petition Appendix at A-

18 and A-19, A-26 through A-28. In its discussion, the Court of Appeals cited State v. Richards, 110 Ariz. 290, 518 P.2d 113 (1974), for the rule, based upon former Ariz. Rev. Stats. Sec. 13-1403, now ARS Sec. 13-3883, that probable cause is necessary in order to justify a warrantless search. In citing Garcia and Richards, the Court of Appeals is clearly saying that once the officers decide to exceed the scope of the consent they have been given, the fruits of that search extension are suppressible unless probable cause exists. The Court of Appeals also cited State v. Acosta, 166 Ariz. 254, 801 P.2d 489 (App. 1990), on this issue, but in it there is the added difference that the driver there had not consented to the search. The Court of Appeals also cited another Arizona case,

State v. Houpt, 169 Ariz. 550, 821 P.2d 211 (App. 1991), in its discussion of why suspicion, whether reasonable or not, needs more factual basis before it rises to the level of probable cause.

Petitioner also misreads the appellate opinion as to a factual matter. It misquotes the Court of Appeals by saying that the Court found the officers' arousal of their suspicions to be reasonable, Petition at 18. What the Court actually said was very different, Petition Appendix at A-28:

a. that the officers may have had their suspicions raised about the door panels;

b. that such raised suspicions might have been enough to warrant further investigation; but

c. to inquire further as to what

further investigation might have led to probable cause is "merely conjecture."

CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The factual record is clear and concise and supports the decision of the Arizona Court of Appeals. The Jimeno rule is a fact-based standard which the Court of Appeals has correctly applied to the facts before it. Furthermore, the Arizona Court of Appeals correctly applied the standard of probable cause for warrantless searches to that extension of the search beyond the scope of the consent given. The appellate order to suppress evidence in Respondent's case was appropriate and

should not be set aside. Petitioner's efforts here to overthrow the rule of probable cause should be avoided, in keeping with Florida v. Jimeno.

RESPECTFULLY SUBMITTED,

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